Supreme Court, U.S.
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No. 06-893

IN THE

Supreme Court of the United States

HAO ZHU,

Petitioner,

v.

ALBERTO GONZALES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

PENGTIAN MA
LAW OFFICES OF PENGTIAN MA
2961 South Archer Avenue
Chicago, Illinois 60608
(773) 847-7890

Attorney for Petitioner

205369

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

The Seventh Circuit affirmed the Board of Immigration Appeals (BIA)'s decision denying the petitioner's request for asylum, withholding of removal, and protection under the Convention Against Torture (CAT), based on the finding that the mistreatment suffered by the petitioner did not rise to the level of persecution.

Two questions are presented:

1. Did the Immigration Judge, the Board of Immigration Appeals, and the United States Court of Appeals err in making a distinction between a husband and a boyfriend when considering an application for asylum under 8 U.S.A. § 1101(a)(42)(B) based on forced abortion and resistence to China's family planning and birth control policies?

2. Did the mistreatment suffered by the petitioner in China due to his anti-family-planning activities rise to the level of persecution, where his girlfriend was forced to have an abortion after the pregnancy was discovered by Chinese family planning officials, and where the Chinese family planning officials also caused injuries to the Petitioner on the head which required seven stitches?

LIST OF PARTIES

The petitioner is Hao Zhu, a citizen of the People's Republic of China. The United States of America is represented by Alberto R. Gonzales, the Attorney General.

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OPINION BELOW

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JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Seventh Circuit's opinion was rendered on September 29, 2006.

STATEMENT OF THE CASE

1. The petitioner, Hao Zhu, is a citizen of the People's Republic of China. The government commenced removal proceedings against him after he attempted to enter the United States at Chicago's O'Hare International Airport on September 16, 2000. At a January 14, 2003 hearing, the petitioner submitted an application for asylum, a request for withholding of removal under the Immigration and Nationality Act, and a request for deferral of removal under the Convention Against Torture. His request, as indicated in his I-589 form, was based on political opinion.

The petitioner met his girlfriend at a birthday party, and later developed a sexual relationship with her. During the month of April 2000, his girlfriend was found to be pregnant by the school they attended when the students were subject to physical examinations. School authorities questioned the

petitioner because they knew that the petitioner and the girl maintained a very close relationship and the school authorities also notified the local family planning officials of his girlfriend's pregnancy. The family planning officials notified the petitioner and his girlfriend of the need for an abortion. After the two families discussed the matter, the petitioner's girlfriend was sent away in hiding. On April 8, 2000, family planning officials came to the petitioner's home to look for his girlfriend and attempted to take the petitioner to the local police station. The officials kicked the petitioner and struck him with their fists. Not obeying the officials, the petitioner struggled with the officials all the way onto the street, and the officials kept kicking and beating the petitioner, and hit him on the head with a brick, causing him to bleed. Seeing that the petitioner was bleeding, the officials did not take him away, but asked him to turn himself in after seeking treatment. The petitioner went to the hospital and received seven stitches. After that the petitioner went into hiding. While he was in hiding, his girlfriend went back to their hometown after learning of his injury, not knowing that the petitioner had left their hometown. Upon her arrival at her hometown, the petitioner's girlfriend was discovered by the family planning officials who took her away and forced her to have an abortion. The petitioner also testified that after he left his hometown, the police came to look for him and asked his parents about his whereabouts. As a measure of punishment, the family planning officials and local police destroyed the house of the petitioner's family.

2. The immigration judge denied the petitioner's request. The immigration judge found that the petitioner's testimony on aspects related to his relationship with his girlfriend should be fully credited, and that the petitioner had testified in a consistent and credible manner about the manner in

which they met, the school which they both attended, and the circumstances under which she became pregnant. However, the immigration judge perceived that the petitioner's claimed persecution did not rise to the level of persecution because the injuries the petitioner suffered were not sufficient to constitute persecution and the victim was the petitioner's girlfriend rather than his spouse.

3. The petitioner filed an appeal to the Board of Immigration Appeals, which affirmed the decision of the Immigration Judge.

4. The petitioner timely filed a petition for review with the United States Court of Appeals for the Seventh Circuit Court. The Seventh Circuit denied the petition.

REASONS FOR GRANTING THE PETITION

Whether a distinction should be made between a husband and a boyfriend is an important question when considering an asylum application based upon forced abortion and resistance to coercive birth control measures, for which distinction the Board of Immigration Appeals has not offered a rational basis, and to which question the Circuit Courts of Appeals have not provided a uniform answer, resulting in an active circuit split on this question of law.

What mistreatment suffered by a person may rise to the level of persecution is an important question, on which there is no standard, and on which this Court's guidance is urgently warranted.

I REVIEW IS NECESSARY TO RESOLVE AN ACTIVE CIRCUIT SPLIT ON AN IMPORTANT QUESTION OF LAW: WHETHER THE PROTECTIONS OF 8 U.S.C. § 1101(a)(42)(B) SHOULD BE EXTENDED TO UNMARRIED PERSONS, AND TO PROVIDE GUIDANCE TO LOWER COURTS AS TO WHAT CONSTITUTES PAST PERSECUTION UNDER 8 U.S.C. § 1101 (a)(42)(A) AND (B).

To establish eligibility for asylum, an applicant must demonstrate that he or she is a "refugee" within the meaning of the Immigration and Nationality Act (INA) by proving that he or she was persecuted in the past or has a well-founded fear of future persecution on account of her race, religion, nationality, membership in a social group, or political opinion. *See* 8 U.S.C. § 1101 (a)(42)(A). The Seventh Circuit has defined persecution as "punishment or the infliction of harm for political, religious, or other reasons that this country does not recognize as legitimate." *Nakibuka v. Gonzales,* 421 F.3d 473, 476 (7th Cir. 2005). A single episode of physical abuse can be sufficient to sustain a claim of past persecution, if it is severe enough. *Asani v. INS,* 154 F.3d 719, 723 (7th Cir. 1998), *Vanduva v. INS,* 131 F.3d 689, 690 (7th Cir. 1997). The Seventh Circuit insists that physical injury serious enough to compel a finding of past persecution is typically accompanied by one or more additional factors. (App. A at 4a). The majority of Seventh Circuit determined that such additional factors are not present in the instant case. (App. A at 4a). For the reasons to be stated below, the Seventh Circuit Court erred.

The Seventh Circuit Court also refuses to extend the protections of 8 U.S.C. § 1101(a)(42)(B) to the Petitioner

because the Petitioner was the boyfriend rather than the husband of the woman who was forced to undergo an abortion. The Seventh Circuit also erred. 8 U.S.C. § 1101(a)(42)(B) declares that:

> a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

8 U.S.C. § 1101(a)(42)(B).

The Board of Immigration Appeals has construed this section to provide that coerced abortion or sterilization of one spouse is an act of persecution against the other spouse and that the spouses of those directly victimized are eligible for asylum in this country. *Matter of C-Y-Z-*, 21 I. & N. Dec. 915, 919 (BIA 1997). The Seventh Circuit has recently interpreted the language of 8 U.S.C. § 1101(a)(42)(B) as affording protection to spouses in cases where a traditional marriage ceremony has taken place, but is not recognized by the Chinese government because of the age restrictions in the population control measures. *See Zhang v. Gonzales,* 434 F.3d 993, 999 (7th Cir. 2006). However, the Seventh Circuit, like it did in this instant case, has declined to expand the definition of "refugee" to include the boyfriends of women

who are forced to abort a pregnancy. *See Chen v. Gonzales*, 457 F.3d 670 (7th Cir. 2006). The Seventh Circuit has acknowledged that "there is an active circuit split on this question of law." *Id.* [1]

A. *Review Is Necessary to Resolve an Active Circuit Split as to Whether the Protections u .der 8 U.S.A. § 1101 (a)(42)(B) Should be Extended to Unmarried Persons.*

The Board of Immigration Appeals has construed this section to provide that coerced abortion or sterilization of one spouse is an act of persecution against the other spouse and that the spouses of those directly victimized are eligible for asylum in this country. *Matter of C-Y-Z-*, 21 I. & N. Dec. 915, 919 (BIA 1997). The Seventh Circuit has recently interpreted the language of 8 U.S.C. § 1101(a)(42)(B) as affording protection to spouses in cases where a traditional

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1. For example, compare *Ma v. Ashcroft*, 361 F.3d 553, 561 (9th Cir. 2004) (holding 8 U.S.C. § 1101(a)(42)(B) applicable to "husbands whose marriages would be legally recognized, but for China's coercive family planning policies, and not only to husbands whose marriages are recognized by Chinese authorities") with *Chen v. Ashcroft*, 381 F.3d 221, 226-27, 229 (3d Cir. 2004) (giving Chevron deference to the BIA's "decision not to extend *C-Y-Z-* to unmarried partners" but dubious about the BIA's reasoning extending statutory protection to spouse who was not forced to undergo abortion or sterilization). See also *Yuan v. U.S. Dep't of Justice*, No. 02-4632-AG, 2005 WL 1745200, at *4 (2d Cir. July 26, 2005) (expressing doubt as to BIA's reasoning in *C-Y-Z-*). The Second Circuit has recently remanded three cases raising the issue of the eligibility of boyfriends and fiancés under 8 U.S.C. § 1101(a)(42)(B) to the BIA so that the BIA can "more precisely explain its rationale"behind its construction and define if and when non-married partners may be eligible for asylum. *Lin v. U.S. Dep't of Justice*, No. 02-4611, 2005 WL 1791996, at *5 (2d Cir. July 29, 2005).

marriage ceremony has taken place, but is not recognized by the Chinese government because of the age restrictions in the population control measures. *See Zhang v. Gonzales,* 434 F.3d 993, 999 (7th Cir. 2006). As Judge Rovner observes, the protection afforded by 8 U.S.C. § 1101(a)(42)(B) applies to a spouse regardless of whether that spouse independently resists or oppose the coercive population control program. A spouse who sits idly by or even supports the termination of his wife's pregnancy nevertheless gets the protection of 8 U.S.C. § 1101(a)(42)(B), while a boyfriend who even has resisted the forced abortion of his and his girlfriend's fetus, like the Petitioner did in this case, does not receive the protection of the statute. (App. A 15a).

The BIA has not provided its rationale for extending the protection of 8 U.S.C. § 1101(a)(42)(B) to spouses despite several years of prodding by the Second Circuit. *See Gui Ci Pan v. U.S. Attorney General,* 449 F.3d 408, 415 (2d Cir. 2006). And the BIA or the Attorney General has offered no clue to a rational basis for granting a presumption of past persecution to spouses but not to men who impregnate women upon whom government authorities force abortions. The majority of the Seventh Circuit focuses its attention on whether a marriage was registered or whether a wedding ceremony has taken place, but again, has not offered its rationale for its ruling.

In *Chen v. Gonzales*, 457 F.3d 670 (7th Cir. 2006), the Seventh Circuit declined to extend the protection of § 1101 (a)(42)(B) to Chen who decided to cohabit with his girlfriend after repeated denial of their applications to register a marriage due to their underage. The Seventh Circuit declared that Chen was merely a boyfriend and declined to extend to him the presumptions of § 1101 (a)(42)(B). *Id.* at 674.

In *Zhang v. Gonzales*, 434 F.3d 993 (7th Cir. 2006), however, the Seventh Circuit extended the protection of § 1101 (a)(42)(B) to Zhang where Zhang and his wife had a traditional Chinese wedding ceremony at home, but never officially registered the marriage. *Id.* at 995. *See also Ma v. Ashcroft*, 361 F.3d 553, 669 (9th Cir. 2004)

> ["t]he BIA's refusal to grant asylum to an individual who cannot register his marriage with the Chinese government on account of a law promulgated as part of its coercive population control policy, a policy deemed by the Congress to be oppressive and prosecutory, contravenes the statute and leads to absurd and wholly unacceptable results."

In this instant case, the petitioner testified that he did not marry his partner, Yun Dong, because both he and Dong were too young to do so under Chinese law. He did vow to support the child and, along with his parents, help raise the child, and therefore demonstrated a commitment to establishing a "family" as best as he could. The parents of the two teens also agreed together that they would attempt to keep and help raise the child. This is sufficient to establish the type of commitment shown in *Zhang*, 434 F.3d 993 (7th Cir. 2006); *Chen*, 457 F.3d 670 (7th Cir. 2006); and *Ma*, 361 F.3d 553 (9th Cir. 2004), but the results in the cases are sharply different.

As Judge Rovner observes, the two Seventh Circuit decisions lead to an odd distinction. Men who enter into a traditional common law marriage in defiance of China's laws can claim the protections of § 1101 (a)(42)(B). Men who cohabit after their application for a marriage license is denied,

cannot. In *Zhang*, *Chen*, *Ma,* and the instant case, similar situations led to sharply different results. The reason for this type of inconsistent and conflicting decisions is that the Courts focus their attention entirely on such superficial and external factors as a wedding ceremony, or a piece of paper called a "marriage license." A marriage is a social relationship which could be the culmination of the true love between a man and a woman, and their genuine expression of a desire to raise a family together, or which could have arisen out of some other extraneous and transient factors that are beyond the grasp of the legal mind.

As Judge Rovner correctly points out, the important inquiry ought to be the nature of the relationship between the asylum applicant and the woman who has been forced to terminate her pregnancy. (App. A at 19a, citing *Ma*, 361 F.3d at 557 ("whether or not the persecuting country, China, would decline to recognize the marriage on technical grounds . . . has little, if anything, to do with an asylum application."). However, for considerations under § 1101(a)(42)(B), this relationship should be considered in terms of the man and woman's relationship to the aborted fetus, a blood and natural relationship this is not subject to the changes in other extraneous and transient factors. When the focus of inquiry is on the aborted fetus, a distinction between a husband and a boyfriend makes no legal sense in considering the availability of the protections of § 1101(a)(42)(B). As a husband has in his wife's, a boyfriend has the same interest in his girlfriend's pregnancy, of which he is the cause; a boyfriend has the same interest in the life and death of the unborn baby, of whom he is the father. A boyfriend who resists coercive birth control measures on his girlfriend has the same and an equally strong interest in the pregnancy of his girlfriend as a husband in his wife's.

Abortion itself is not only a violation of a woman's bodily integrity, but also her natural instinct to protect her child, an instinct that is shared by both men and women, and the whole mankind. Forced abortion is an outrageous practice that shocks the national sense of morality of this nation, which should be the rationale underlying the enactment of 8 U.S.C. § 1101(a)(42)(B). A man and a woman, when jointly deciding to bring a child to the world, are closely connected by this shared natural instinct to protect their offsprings. Forced abortion is a terrible thing to both the mother and father, no matter whether they are married or not. Under such circumstances, an unmarried man who was mistreated because of his conscientious resistance to coercive birth control measures should be equally protected.

B. ***Review Is Necessary to Provide Guidance to Lower Tribunals as to What Factors Should Be Considered When Determining Whether the Mistreatment Suffered by an Asylum Applicant Rose to the Level of Past Persecution.***

The Seventh Circuit concedes that the petitioner's head injury, which required seven stitches, was a serious one, but it concluded that although "[h]is injury weighs in favor of a finding of past persecution, it is without the typical accompanying factors that we have previously deemed significant." (App. A at 8a). The Seventh Circuit erred in that it has ignored the evidence in the record that the injury as a result of the beating was accompanied by an additional factor – the forced abortion of his and his girlfriend's fetus.

As Judge Rovner has correctly pointed out in her dissenting opinion, "the majority opinion errs by bifurcating Zhu's claim into discreet parts." (App. A at 14a).

> "First, it looks at Zhu's claim of physical abuse and concludes that the single instance of abuse was, by itself, insufficient to support a claim of persecution. Then, it looks to see whether Zhu's status as the non-marital partner of a woman forced to abort a pregnancy entitles him, in and of itself, to an automatic finding of past persecution under 8 U.S.C. § 1101(a)(42)(B)."

(App. A at 14a). The majority acknowledges that the petitioner's head injury requiring seven stitches was a serious one which "weighs in favor of a finding of persecution." (App. A at 4a, 5a, 7a, and 8a). But the majority insists that the injury suffered by the Petitioner "is without the typical accompanying factors that we have previously deemed significant." (App. A at 8a).

The majority of the Seventh Circuit erred. Regardless of whether the petitioner is entitled to an automatic finding of past persecution under 8 U.S.C. § 1101 (a)(42)(B), the forced abortion of his and his girlfriend's fetus is a much more important "accompanying factor" in this instant case. That the Chinese authorities beat the Petitioner on the head with a brick causing an injury requiring seven stitches is not an isolated event. They came to his house in search of his girlfriend, and kicked and punched him. As Judge Rovner has correctly pointed out, the majority of the Seventh Circuit ignored the most important fact that the Chinese authorities "aborted his and Yun Dong's fetus, depriving him of the opportunity to parent a child that he and Yun Dong had jointly decided to bring to the world." (App. A at 15a). The Petitioner's head injury, the kicking and punching, and most significantly, the forced abortion, when properly viewed as

a whole, compel a finding a past persecution. *Id., also see INS v. Elias-Zacarias,* 502 U.S. 478 481, n. 1, 112 S. Ct. 812 (1992). In failing to make a finding of past persecution, the majority of the Seventh Circuit erred.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

PENGTIAN MA
LAW OFFICES OF PENGTIAN MA
2961 South Archer Avenue
Chicago, Illinois 60608
(773) 847-7890

Attorney for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED SEPTEMBER 29, 2006

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 05-3186

HAO ZHU,

Petitioner,

v.

ALBERTO R. GONZALES,

Respondent.

On Petition for Review of an Order of
the Board of Immigration Appeals.
No. A78-289-252.

ARGUED FEBRUARY 21, 2006—DECIDED SEPTEMBER 29, 2006

Before BAUER, KANNE, and ROVNER, *Circuit Judges.*

BAUER, *Circuit Judge.* Hao Zhu, a citizen of the People's Republic of China, appeals the denial of his request for asylum, withholding of removal, and protection under the Convention Against Torture (CAT). We deny Zhu's petition for review.

Appendix A

I. Background

The government commenced removal proceedings against Zhu after he attempted to enter the United States at Chicago's O'Hare International Airport on September 16, 2000. At a January 14, 2003 hearing, Zhu submitted an application for asylum, a request for withholding of removal under the Immigration and Nationality Act (INA), and a request for deferral of removal under the CAT. Zhu indicated in his I-589 form that his asylum request was based on political opinion.

Although the immigration judge (IJ) did not credit portions of Zhu's testimony, he stated that "on aspects related to his relationship with his girlfriend, Yun Dong, [Zhu's testimony] should be full[y] credited." Because of the IJ's credibility determination, the facts are undisputed. Zhu impregnated Dong in early 2000. On April 7, he admitted to school officials that he was responsible for her pregnancy. When the family planning commission ordered Dong to appear at the hospital on April 8, she decided to travel to Shan Ming City to hide. That day, family planning officials came to Zhu's home looking for Dong. They kicked and struck Zhu with fists in an attempt to bring him to the police station. Zhu also was hit on the head with a brick, an injury that required seven stitches. When Zhu started bleeding, the officials asked him to turn himself in after seeking treatment. They did not detain him. Zhu later traveled to Shan Ming City to find Dong, who, unbeknownst to him, had already returned home, been discovered, and forced to abort the pregnancy. After returning home and speaking with Dong, Zhu decided to leave for the United States. Upon his arrival

at O'Hare, he stated that he left China because of the coercive birth control policy. He also stated that he would possibly be jailed if he returned.

The IJ ruled that Zhu failed to establish either past persecution or a well-founded fear of future persecution, and denied his request for asylum, withholding, and deferral of removal. After the BIA affirmed the IJ's decision, Zhu petitioned for review.

II. Discussion

When the BIA summarily affirms, we review the IJ's decision. *Nakibuka v. Gonzales,* 421 F.3d 473, 476 (7th Cir.2005). We review the BIA's factual determinations under the highly deferential substantial evidence standard. *Dandan v. Ashcroft,* 339 F.3d 567, 572 (7th Cir.2003). We will not grant the petition for review unless the petitioner demonstrates that "the evidence not only supports [reversal of the BIA's decision], but *compels* it." *Liu v. Ashcroft,* 380 F.3d 307, 312 (7th Cir.2004) (quoting *I.N.S. v. Elias-Zacarias,* 502 U.S. 478, 481 n. 1, 112 S.Ct. 812, 117 L.Ed.2d 38 (1992) (emphasis in original)).

A. Asylum

To establish eligibility for asylum, an applicant must demonstrate that she is a "refugee" within the meaning of the INA by proving that she was persecuted in the past or has a well-founded fear of future persecution on account of her race, religion, nationality, membership in a social group, or political opinion. *See* 8 U.S.C. § 1101(a)(42)(A); *Liu,* 380

F.3d at 312. The applicant bears the burden of demonstrating persecution. *See* 8 U.S.C. § 1158(b)(1); 8 C.F.R. § 208.13(a). We have previously defined persecution as "punishment or the infliction of harm for political, religious, or other reasons that this country does not recognize as legitimate." *Nakibuka,* 421 F.3d at 476 (citing *Liu,* 380 F.3d at 312). Although an asylum applicant need not show that her life or freedom were threatened, the harm suffered must rise above the level of "mere harassment" and result from more than unpleasant or even dangerous conditions in her home country. *Id.*

1. Past Persecution

Zhu first claims that he suffered past persecution, in the form of a beating by family planning officials, on account of his resistance to China's family planning policies. Although the IJ credited Zhu's testimony regarding his mistreatment, he determined that the facts did not warrant a finding of past persecution. The testimony reveals that the officials beat Zhu on this one occasion alone. Past persecution may be demonstrated by a single episode of physical abuse, if it is severe enough. *Dandan,* 339 F.3d at 573. Zhu's beating required medical attention and, he claims, caused an injury that is comparable to other allegations of serious and specific physical abuse which we have found to constitute past persecution. While a cut requiring seven stitches is doubtless a substantial injury, however, we must consider all of the circumstances of the incident in specific detail, for "it is the details that reveal the severity of" the abuse at issue. *Liu,* 380 F.3d at 313. A thorough review of the relevant case law reveals that physical injury serious enough to compel a finding of past persecution is typically accompanied by one or more additional factors that are not present here.

For instance, we found that the facts compelled a finding of past persecution where a severe beating resulted in the petitioner's miscarriage, but that petitioner was also physically assaulted on two other occasions, detained twice, and threatened with sexual assault once. *See Vladimirova v. Ashcroft,* 377 F.3d 690, 692 (7th Cir.2004). The evidence likewise compelled reversal where the petitioner's face was cut with a razor, but that petitioner was beaten on four separate occasions over the course of two months and was forced to watch his wife being raped. *See Bace v. Ashcroft,* 352 F.3d 1133, 1138 (7th Cir.2003). We remanded to the BIA on the question of past persecution where a petitioner's beating resulted in the loss of two teeth, but the petitioner was also detained and handcuffed to a radiator for two weeks in a cell with only enough room to stand, deprived of sufficient food and water, and detained and questioned on a separate occasion. *See Asani v. I.N.S.,* 154 F.3d 719, 723 (7th Cir.1998). Lastly, we held that the evidence compelled reversal where the petitioner sustained injuries requiring three days of medical care; the petitioner was also detained for two weeks, beaten daily, given only minimal food and water, and had salt literally rubbed into his wounds. *See Soumahoro v. Gonzales,* 415 F.3d 732, 737-38 (7th Cir.2005). In each of these cases, then, there were further incidents of abuse, such as detention, repeated beatings, and other humiliating or harmful acts beyond the resulting physical injury. Zhu endured only the single beating, was never detained, and was never subjected to additional abuse. Although Zhu's physical injury is arguably as substantial as the ones suffered in these cases, the overall experiences endured by these petitioners were at once both more prolonged and more severe than that which Zhu encountered. To be clear, we by no means seek to

minimize Zhu's ordeal; we endeavor only to illuminate the distinctions essential to ruling on such a fact-specific determination.

In another group of cases, we have reviewed the BIA's analysis of the petitioner's single episode of physical abuse. First, we upheld the BIA's finding of past persecution where the petitioner suffered a bruised face and broken finger from a single Christmas Eve beating. *Vaduva v. I.N.S.,* 131 F.3d 689, 690 (7th Cir.1997). Although the Christmas Eve beating alone supported the BIA's finding, we incidentally noted that Vaduva was beaten on another occasion and endured "harassing telephone calls, warnings, and at least one interrogation." *Id. Vaduva* also differs from the present matter in its procedural posture; there, we upheld the BIA's finding of past persecution as supported by substantial evidence, whereas here we are asked to reverse the BIA and hold that the evidence compels such a finding. *Id.* Under the substantial evidence standard of review, we reverse "only if 'no reasonable fact-finder could fail to find' that [the petitioner] had suffered from past persecution." *Oforji v. Ashcroft,* 354 F.3d 609, 613 (7th Cir.2003) (quoting *Georgis v. Ashcroft,* 328 F.3d 962, 967-68 (7th Cir.2003)).

In a second case involving "a single episode of detention or physical abuse," we upheld the BIA's finding of no past persecution where the petitioner was beaten until his face was swollen and was detained for three days without food. *See Dandan,* 339 F.3d at 571. In so ruling, we noted that Dandan did not present the specifics of his injury that would "indicate the severity of the beating and support its claim to be considered persecution." *Id.* at 574. We distinguished

Asani, where the petitioner lost two teeth, and *Vaduva,* where the petitioner suffered a bruised face and broken finger. *See id.* Although the specific nature of Zhu's injury, a cut requiring seven stitches, would seem to differentiate his case from *Dandan,* we also noted that such specifics are not "the *sine qua non* of persecution." *Id.* The result, moreover, rested equally on the fact of Dandan's single detention; we noted that "[a]lthough the frequency issue is not dispositive, it does figure significantly in the analysis." *Id.* at 573. This factor militates against Zhu's position, for he encountered the authorities but once.

In again upholding the BIA's finding of no past persecution, we emphasized that the petitioner had to endure only "a singular event" of pushing and hair-pulling, even though she was detained for two days, interrogated, and had her apartment ransacked. *See Liu,* 380 F.3d at 313. In both *Liu* and *Dandan,* then, we upheld the BIA's finding of no past persecution based in part on the fact that the petitioner, like Zhu, encountered only a single instance of abuse. The severity and specificity of the injury Zhu describes, however, is more on the order of the petitioner's injury in *Vaduva.* Another recent case helps to illustrate these countervailing factors; in it we upheld the BIA's decision that no past persecution resulted from an unspecified injury to the petitioner's hands, even though the police interrogated him three times, detained him for twenty-four hours, harassed him for money, and threatened to kill him. *Prela v. Ashcroft,* 394 F.3d 515, 517-18 (7th Cir.2005). Although the injury Zhu describes is more serious and specific than the injury suffered in *Prela,* his ordeal on the whole is less serious in that he was never detained and never endured additional

humiliating or harmful official action (such as the repeated encounters with, and threat from, the police). His injury weighs in favor of a finding of persecution, but is without the typical accompanying factors that we have previously deemed significant.

In short, none of our past cases is precisely on point. All in all, though, we find that the evidence of this isolated beating does not compel a finding of past persecution. Essential to this ruling is our understanding of the deferential nature of substantial evidence review. *See Prela,* 394 F.3d at 518; *Liu,* 380 F.3d at 313-14; *Dandan,* 339 F.3d at 573-74 (describing substantial evidence, in the context of reversal, as "a high standard and one that is properly difficult to meet without powerful and moving evidence"). While the officials' treatment of Zhu in China was undeniably deplorable, substantial evidence supports the BIA's determination.

Zhu next argues that he suffered past persecution because his girlfriend Dong was forced to have an abortion. The definition of "refugee" was amended to provide that:

> a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion.

8 U.S.C. § 1101(a)(42)(B). The BIA has previously interpreted this language so that "past persecution of one

spouse can be established by coerced abortion or sterilization of the other spouse." *Matter of C-Y-Z-*, 21 I. & N. Dec. 915, 917 (BIA 1997). The IJ held that Zhu's status as the boyfriend of a woman who was forced to abort her pregnancy did not entitle him to a finding of past persecution under the amendment. This legal determination is subject to *de novo* review. *Ahmed v. Ashcroft,* 348 F.3d 611, 615 (7th Cir.2003).

We have interpreted the language of the amendment as affording protection to spouses in cases "[w]here a traditional marriage ceremony has taken place, but is not recognized by the Chinese government because of the age restrictions in the population control measures." *See Zhang v. Gonzales,* 434 F.3d 993, 999 (7th Cir.2006). Zhu cannot claim this protection for himself, however, because he and Dong engaged in no marriage ceremony; they were simply boyfriend and girlfriend. There was not even a suggestion that they had planned to wed. A case that we recently decided controls. *See Chen v. Gonzales,* 457 F.3d 670 (7th Cir.2006). We, like other circuits, have declined to expand the definition of "refugee" to include the boyfriends of women who are forced to abort a pregnancy. *See id.* at 674; *see also Zhang v. Ashcroft,* 395 F.3d 531, 532 (5th Cir.2004); *Chen v. Ashcroft,* 381 F.3d 221, 227-29 (3d Cir.2004). Zhu cannot demonstrate past persecution on this basis.

2. Well-Founded Fear of Future Persecution

Without a finding of past persecution, a person seeking asylum must prove that she genuinely fears she will be persecuted based on a protected ground if returned to her native country, and that her fears are objectively reasonable.

Liu, 380 F.3d at 312 (citing *I.N.S. v. Cardoza-Fonseca,* 480 U.S. 421, 430-31, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987)). In his brief, however, Zhu does not claim that he has an independent fear of persecution, but rather relies completely on the presumption that arises from a demonstration of past persecution. *See* 8 C.F.R. § 208.13(b)(1); *Dandan,* 339 F.3d at 573. He cannot avail himself of this presumption, however, because we upheld the BIA's finding that he suffered no past persecution.

We additionally note the IJ's correct assertion that the likelihood of Zhu's persecution upon return to China was quite minimal, given the fact that Dong was already forced to abort her pregnancy. When questioned upon his arrival at O'Hare, Zhu stated that he would possibly be jailed if he returned to China. Such an indeterminate suggestion, however, cannot qualify as objectively reasonable. *See Borca v. I.N.S.,* 77 F.3d 210, 214 (7th Cir.1996) (to establish reasonableness, the "petitioner must present specific, detailed facts showing a good reason to fear that he or she will be singled out for persecution"). Zhu's fear of possible future arrest seems strange given the officials' decision not to detain him on April 8. In fact, Zhu remained in China until September and was never detained. It is more reasonable to presume that persecution intended to coerce adherence to the family practice policies would cease after the forced abortion was carried out. Zhu fails to demonstrate a well-founded fear of future persecution.

Appendix A

B. Withholding and Deferral of Removal

Finally, because Zhu has not met the lesser burden of proof required to establish eligibility for asylum, we decline to consider his claims for withholding of removal under the INA and deferral of removal under the CAT, both of which entail a higher standard of proof. *See Ahmed,* 348 F.3d at 619.

III. Conclusion

For the foregoing reasons, we Deny the petition for review.

Appendix A

ROVNER, Circuit Judge, dissenting. My colleagues have written a measured decision in response to a difficult recurring asylum problem. The majority's opinion, however, views Zhu's claims piecemeal and concludes that he has not faced persecution. If the whole of his claims are considered, however, the evidence compels a finding of past persecution. For this reason, I dissent.

There is no dispute, of course, that Zhu bases his asylum claim on injuries he suffered as a result of his political beliefs. Opposing and resisting China's coercive population control policy and encouraging others to resist conforming is precisely the type of political opinion that our asylum laws were written to protect. *See* 8 U.S.C. § 1101(a)(42)(B). In the case of pregnant women who have defied Chinese authority by reproducing, Chinese authorities might respond to their opposition by subjecting the women to involuntary abortions or sterilization. U.S. Department of State Country Reports on Human Rights Practices-2003, China, February 25, 2004, p. 12, 29 (hereinafter "Country Report") (R. at 182, 198). For their male partners who voice or encourage opposition, the punishment varies. They may be arrested, fined, sterilized, interrogated, denied employment, government benefits, or property, or subject to any number of discriminatory acts. Country Report, p. 12-13 (R. at 181-182). Their female partners might also face abortion or sterilization procedures in response to their resistance.

Zhu resisted China's coercive population control policy in two ways. First, Zhu and his girlfriend, Yun Dong, failed to abide by the government's request that Yun Dong terminate her pregnancy. Second, Zhu abetted Yun Dong in her efforts

to hide and refused to cooperate with the authorities' efforts to find her. In response to Zhu's first act of resistance, government officials came to Zhu's house to arrest and detain him in hopes of forcing Yun Dong out of hiding. When Zhu resisted arrest, the officials kicked and beat him, carrying him into the street where they hit him on the head with a brick causing a head injury requiring seven stitches.

Resolution of this matter should be straight forward. 8 U.S.C. § 1101(a)(42)(B) declares that:

> **a person** who has been forced to abort a pregnancy or to undergo involuntary sterilization, or **who has been persecuted** for failure or refusal to undergo such a procedure or **for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion**, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

8 U.S.C. § 1101(a)(42)(B) (emphasis added). Government authorities beat and injured Zhu based on his "resistance to a coercive population control program." The only remaining question is whether Zhu's injuries were sufficient to constitute persecution.

As the majority correctly points out, a single episode of physical abuse can be sufficient to sustain a claim of past

persecution, if it is severe enough. *Asani v. INS,* 154 F.3d 719, 723 (7th Cir.1998), *Vaduva v. INS,* 131 F.3d 689, 690 (7th Cir.1997). The majority concedes that Zhu's head injury, which required seven stitches, is a serious one but concludes that although "[h]is injury weighs in favor of a finding of past persecution, [it] is without the typical accompanying factors that we have previously deemed significant." Majority opinion at 320. The majority points out that a "physical injury serious enough to compel a finding of past persecution is typically accompanied by one or more additional factors that are not present here." *Id.* at 319. Zhu's beating, however, was accompanied by an additional factor-the forced abortion of his and Yun Dong's fetus.

The majority opinion errs by bifurcating Zhu's claim into discreet parts. First, it looks at Zhu's claim of physical abuse and concludes that the single instance of abuse was, by itself, insufficient to support a claim of persecution. Then, it looks to see whether Zhu's status as the non-marital partner of a woman forced to abort a pregnancy entitles him, in and of itself, to an automatic finding of past persecution under 8 U.S.C. § 1101(a)(42)(B). Even were I to agree with the majority that, as a matter of law, only husbands and not unmarried partners are automatically deemed to have been persecuted under § 1101(a)(42)(B), neither this court nor the BIA can ignore the fact of a forced abortion when considering the whole of the circumstances surrounding a particular claim of persecution. In other words, the forced abortion inflicted upon Zhu's partner may not be a fact that entitles Zhu to a per se presumption of past persecution (a question I will turn to momentarily), but neither can it be ignored as though it were entirely unrelated to the persecution at issue. The

majority thought Zhu's head injury would have been serious enough to compel a finding of past persecution only if it had been accompanied by additional factors, but then ignored the other factors. The authorities did not simply beat Zhu on the head with a brick causing an injury requiring seven stitches. They came to his house in search of his girlfriend, they kicked and punched him, and, most significantly, they aborted his and Yun Dong's fetus, depriving him of the opportunity to parent a child that he and Yun Dong had jointly decided to bring into the world. It seems clear to me that the evidence, when properly viewed as a whole, compels a finding of past persecution, independent of Zhu's relationship to Yun Dong. *See INS v. Elias-Zacarias,* 502 U.S. 478, 481 n. 1, 112 S.Ct. 812, 117 L.Ed.2d 38 (1992).

This should, in and of itself, resolve the matter for Mr. Zhu, but the majority's discussion of 8 U.S.C. § 1101(a)(42)(B) and its application to non-spouses warrants further thought. As the majority points out, in 1997 the BIA construed this section to provide that the forced abortion or sterilization of one spouse is an act of persecution against the other spouse and that the spouses of those directly victimized are eligible for asylum in this country. *In re C-Y-Z,* 21 I. & N. Dec. 915, 919 (BIA 1997). Interestingly, this application applies to spouses regardless of whether that spouse independently resists or opposes the coercive population control program. A spouse who sits idly by or even supports the termination of his wife's pregnancy nevertheless gets the protection of the statute. The BIA did not offer its rationale for extending the protection to spouses, and despite several years of prodding by the Second Circuit, still has failed to do so. *See Gui Ci Pan v. U.S. Attorney*

Gen., 449 F.3d 408, 415 (2d Cir.2006). Without such knowledge, it is difficult to know whether there is a rational basis for granting a presumption of past persecution to spouses but not to other men who impregnate women upon whom government authorities force abortions.

To support the proposition that the presumption of past persecution extends only to the husband of a woman who has been forced to have an abortion, the majority relies, in part, on our holding in *Chen v. Gonzales,* 457 F.3d 670 (7th Cir.2006). The *Chen* decision did indeed "decline to extend the definition of 'refugee' to reach boyfriends" where there has been no extra-governmental marriage ceremony. *Id.* at 674. The holding in *Chen*, although not directly in conflict with any prior circuit decision, leaves the circuit law on this issue in an odd state of affairs. Eight months before our decision in *Chen,* we granted asylum to Junshao Zhang. *Zhang v. Gonzales,* 434 F.3d 993 (7th Cir.2006). Zhang and his wife had a traditional Chinese wedding ceremony at home, but never officially registered the marriage because neither had reached the legal age for marriage in China. *Id.* at 995. We held that "[w]here a traditional marriage ceremony has taken place, but is not recognized by the Chinese government because of the age restrictions in the population control measures, that person nevertheless qualifies as a spouse for purposes of asylum." *Id.* at 999. We reasoned that to hold otherwise would create a Catch-22.

> Zhang's asylum claim was based on China's enforcement of its population control policy, part of which includes a minimum age requirement for marriages, and a minimum age for having

> children. The forcible abortion in this case occurred precisely because Zhang and his wife married and became pregnant prior to those minimum ages. The marriage is not legal in China because of the population control policy.

Id.

Despite this reasoning in *Zhang,* in *Chen* we declined to extend the protections of the asylum law to a man in significantly similar circumstances. *Chen,* 457 F.3d at 675. Yaun Rong Chen, like Zhang, attempted to register for a marriage license, and like Zhang, the authorities denied him the license because he and his partner, Li Ping, were too young to be legally married. *Id.* at 672. Unlike Zhang, however, who responded to the license denial by having a non-sanctioned wedding ceremony, Chen and Li Ping opted to co-habitate. *Id.* As with Zhang's partner, Li Ping subsequently became pregnant. Chen's efforts to marry did not end there. He tried once again to become Li Ping's lawful husband by applying for a marriage license a second time in light of Li Ping's pregnancy. *Id.* at 672. Instead of issuing the license, the town government sent a letter demanding that Li Ping "voluntarily" submit to an abortion. *Id.* In just a matter of days, population control officials found Li Ping and took her to a hospital to terminate her pregnancy. *Id.* Despite Chen's two failed attempts at obtaining a marriage license, his co-habitation with Li Ping, and his efforts, in concert with Li Ping, to start a family, this circuit declared that Chen was merely a boyfriend and declined to extend to him the presumptions of § 1101(a)(42)(B). *Id.* at 674.

In short *Chen* and *Zhang* together, lead to an odd distinction. Men who apply for a marriage license, are denied, and enter into a traditional common law marriage in defiance of China's laws can claim the protections of § 1101(a)(42)(B). Men who apply for a marriage license, are denied, heed the law of the land and merely cohabitate, cannot. The latter holding ignores the rationale of *Zhang* which recognized that it was China's oppressive population control measure that prevented Zhang from getting married and thus being able to take advantage of the protections of § 1101(a)(42)(B) in the first place. This is the Catch-22 to which we referred in *Zhang. See also Ma v. Ashcroft,* 361 F.3d 553, 559 (9th Cir.2004) ("[t]he BIA's refusal to grant asylum to an individual who cannot register his marriage with the Chinese government on account of a law promulgated as part of its coercive population control policy, a policy deemed by Congress to be oppressive and prosecutory, contravenes the statute and leads to absurd and wholly unacceptable results.") In short, in *Zhang, Chen, Ma* and the instant case, a woman was forced to terminate a pregnancy solely because she was not married, and the reason she was not married was because of China's restrictive population control program.

We are treading, I fear, on indefensible ground, by relying on the persecuting country to define the parameters of a legitimate marriage. Suppose, for example, two men appear before an immigration judge in separate cases and claim that government officials forced their female partners to abort a pregnancy. The cases are identical in all respects except in the first case the couple married under the official laws of the country. In the second case, the couple applied for a marriage license but was denied because the country in which

the couple resided prohibits marriages between those who are black (as is the husband) and those who are white (as is the wife). I could, of course, paint a similar scenario replacing race with religion. In fact, in *Qu v. Gonzales,* 399 F.3d 1195 (9th Cir.2005), Qu and his wife were denied a birth permit because Qu's family was affiliated with counter-revolutionary elements who adhered to Christian beliefs. *Id.* at 1197. It is likely that Chinese officials have denied marriage licenses to other couples based on a family history of unpopular political activity. These are precisely the sorts of restrictions on basic human rights that this country's asylum laws were meant to protect.

The BIA need not extend asylum to every man who has impregnated a woman who was later forced to terminate a pregnancy, but I would not draw the line so solidly between married and not married. The important inquiry, it seems, ought to be the nature of the relationship between the asylum applicant and the woman who has been forced to terminate her pregnancy. *See Ma,* 361 F.3d at 557 ("[w]hether or not the persecuting country, China, would decline to recognize the marriage on technical grounds . . . has little, if anything, to do with [an] asylum application.") *Id.* In short, the competing goals of our asylum laws-to harbor those in need of asylum while weeding out illegitimate claims-can best be met in cases involving § 1101(a)(42)(B) by making the following inquiry: is the couple at issue involved in a spouse-like relationship where both parties have demonstrated an intent to enter into and sustain a long-term partnership for the purpose of raising a child together, and but for the persecuting country's restrictive population control measures, the couple would have married. In this case, Zhu testified

that he did not marry his partner, Yun Dong, because both he and Dong were too young to do so under Chinese law. (R. at 127-128). He did vow to support the child and, along with his parents, help raise the child, (R. at 125, 128), and therefore demonstrated a commitment to establishing a "family" as best as he could. The parents of the two teens also agreed together that they would attempt to keep and help raise the child. (R. at 105-06, 124-25). This is probably sufficient to establish the type of commitment I describe, but in any event it is a factual inquiry that ought to be made on a case-by-case basis.

The government argues that a bright line rule advances the agency's interest in weeding out fraudulent claims. Such an argument is appealing but not entirely satisfying. Many people flee persecution without packing in their bags documentary evidence of the persecution. *Gjerazi v. Gonzales,* 435 F.3d 800, 809 (7th Cir.2006). Many asylum applicants likely lack proof of a state sanctioned marriage, and even fewer have proof of engaging in a "traditional marriage ceremony." Those who do have such proof are unlikely to have documentation of a forced abortion. The agency has indeed drawn a line, but whether it has any relationship to ferreting out illegitimate asylum claims is speculative at best.

In sum, putting aside the application of § 1101(a)(42)(B) to unmarried partners for a moment, I would find that Zhu suffered past persecution because he was himself persecuted for resisting China's coercive population control program. Furthermore, because Zhu adamantly opposes the coercive birth control policies of China, he has a reasonable fear of

future persecution should he return. The majority reasons that because Zhu's partner has already been forced to abort her pregnancy, Zhu is unlikely to be subject to further persecution. Majority opinion at 321. The majority misunderstands the nature of Zhu's persecution. The government authorities persecuted Zhu because of his opposition and resistance to China's oppressive birth control policies. There is no evidence that he has changed his beliefs. To the contrary, one would imagine that Zhu's personal experience has further fanned the fires of his opposition. Furthermore, Zhu is still subject to all of China's population control measures including a limit on the number of children, further forced abortions, and underage marriage regulations should he choose to marry a woman younger than the limit set by Chinese authorities. *See Zhang,* 434 F.3d at 1002. Moreover, it would be convoluted indeed "to allow the act of persecution itself to constitute the change in circumstances that would result in the denial of asylum." *Id.* at 1001. We should not penalize the persecuted simply because a persecutor has successfully overcome one particular act of resistance.

That alone should be sufficient for a finding of fear of future persecution, but both this court and the BIA have noted that a forced abortion creates ongoing suffering that also suffices for a finding of a well-founded fear of future persecution. *Zhang,* 434 F.3d at 1001-02; *In re Y-T-L,* 23 I. & N. Dec. 601, 607 (BIA 2003). The BIA has specifically held that the fact that an asylum applicant (or the wife of an asylum applicant) has been permanently sterilized and therefore cannot be persecuted in this manner again, cannot constitute a change of circumstances for purposes of

determining "fear of future persecution." *In re Y-T-L,* 23 I. & N. Dec. at 607. Sterilization is a "permanent and continuing act of persecution that has deprived a couple of the natural fruits of conjugal life and the society and comfort of the child or children that might eventually have been born to them." *Id.* The BIA noted that this reasoning held even more sway in the case of a forced abortion where the persecution could be repeated with future pregnancies. *Id.* The forced abortion deprived Zhu of the opportunity that the fetus presented-to *327 someday parent that child and to realize the family that he and Yun Dong together desired and agreed to create. *Zhang,* 434 F.3d at 1001. The effect of that loss is ongoing and permanent. *See, e.g., Qu,* 399 F.3d at 1202, n. 8 (forced abortion causes irremediable and ongoing suffering of being permanently denied the potential for parenthood).

In response to Zhu's fear of future persecution, the government's sole argument is that Zhu could avoid punishment from his former local population control officials by relocating to another region within China. Such a life on the run might successfully prevent him from being arrested again (although if the government officials were serious about catching him, he might expose himself to trouble merely by registering to work and by paying taxes), but it certainly would not protect him from persecution for future acts in defiance of the population control policies. Although enforced erratically in various portions of the country, the policy is a national one that Zhu could not escape by relocating within the country. *See* Country Report, pp. 12-13 (R. at 181-182). Furthermore, "the fact that a person might avoid persecution through concealment of the activity that places her at risk of being persecuted is in no wise

inconsistent with her having a well-founded fear of persecution." *Iao v. Gonzales,* 400 F.3d 530, 532 (7th Cir.2005). We cannot require Zhu to avoid persecution by concealing or altering his strongly held political beliefs.

Chinese authorities persecuted Zhu for his beliefs in the past, and because he has an objectively reasonable fear of future persecution should he return, I would grant the petition for review and hold that Zhu is eligible for asylum.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — ORAL DECISION OF THE IMMIGRATION JUDGE OF THE UNITED STATES DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, IMMIGRATION COURT DATED APRIL 20, 2004

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Chicago, Illinois

File: A 78 289 252

In the Matter of:

HAO ZHU,
Respondent

IN REMOVAL PROCEEDINGS

CHARGE: Section 212(a)(4)(A) of the INA, public charts; and Section 212(a)(7)(A)(i)(II) of the INA, no valid entry visa.

APPLICATION: Asylum, withholding of removal pursuant to Section 241(b) and deferral of removal pursuant to the Convention Against Torture.

ORAL DECISION OF THE IMMIGRATION JUDGE

Background

The respondent is a 20-year-old, male, native and People's Republic of China who attempted to enter the United

States at Chicago's O'Hare International Airport on September 16, 2000. At that time, due to the manner of his attempted entry, the Government (hereinafter "the Department") .commenced removal proceedings against the respondent by charging him with being removable pursuant to the above captioned sections of the Immigration and Nationality Act (hereinafter "the Act").

Removability

The respondent was issued a Notice to Appear on about September 16, 2000. This was on the actual day of the attempted arrival in the United States. The respondent subsequently, through counsel, admitted the factual allegations contained in the Notice to Appear (Exhibit 1), and conceded that he was removable as charged. This occurred on January 14, 2003. Because the respondent had declined to designate a country of removal, the People's Republic of China has been directed pursuant to Section 241(b) of the Act in the event that this becomes necessary. Consequently, removability has been established by clear and convincing evidence as required by the Act and pertinent regulations. *See* 8 C.F.R. 1240.8

Respondent's Request for Relief

At the outset of his merits hearing, the respondent has requested additional time with which to prepare for his asylum hearing. The respondent requested an opportunity to have proceedings continued based on his misunderstanding of the actual merits hearing. The respondent believed that he was scheduled for a status call (master call) hearing on April

20, 2004. The record was played back for all of the parties. It's contents are undisputed.

The respondent was placed under proceedings on September 16, 2000. At the time he was a minor and placed within the custody of the Immigration and Naturalization Service until he turned 18. This occurred on August 16, 2001. At that time the respondent "aged out" of Government custody and he was scheduled for a removal hearing on February 7, 2002 at 1 p.m. The respondent appeared at this point and was given additional time to return to court on September 12, 2002.

The record of proceeding clearly establishes that the respondent returned to court on September 12, 2002 with current counsel. This is approximately one and one half years ago. At that time the record reflects that counsel asked for additional time to return with his application for political asylum.

The respondent's case was continued to January 14, 2003. The respondent did return with counsel on that date and entered a pleading to the allegations contained in the Notice to Appear. The respondent also submitted an I-589 as ordered. The respondent was given an opportunity to have a merits hearing as soon as possible, given the defensive posture of the respondent's claim for asylum.

The record reflects that the respondent denied the first available opportunity to go forward with his merits application and was subsequently given a date of April 20, 2004 at 9 a.m. (today). The respondent, through counsel,

asserts that he was caught by surprise because his hearing notice reflected that his hearing scheduled for April 20, 2004 was truly a "master" or "status" hearing. This is inconsistent with the entire record of proceedings. The respondent, through counsel, was correct that the document, or notice on it's face indicates that the respondent was scheduled for a status call, however the entire record of proceedings indicates that the respondent and counsel were here on two previous occasions over one and one half years ago. At the last hearing, approximately 15 months ago, the respondent and counsel were given a date to return for a full merits hearing on the respondent's request for asylum. In addition to having the final merits hearing date set, the respondent was told to submit any and all forms of relief and other supporting documents by April 9, 2004. This date was a date by which both sides, in essence, were required to submit additional documents to support their respective positions. The respondent submitted nothing.

In addition, the record reflects that the respondent was required to be fingerprinted by October of 2003. Apparently the respondent was in fact printed, consequently the respondent knew or should've known that he was scheduled for a merits hearing. Fingerprints are not required for "master" or "status" calls unless specifically ordered by the Judge in extraordinary cases.

The respondent, through counsel, concedes that the record speaks for itself. Nonetheless, he indicates that he first became aware of the merits hearing this past Saturday (April 17, 2004). The respondent consequently was given sufficient time to prepare his testimony in order to request

asylum and other related relief. Accordingly, the respondent's misunderstanding is one which does not provide this Court with "good cause" so as to continue the merits of his claim. *See* 8 C.F.R. Section 1003.29 (2003).

The respondent has submitted an application for political asylum, as previously indicated, back on January 14, 2003. This is considered a request for withholding of removal under Section 241(b)(3), as well as for deferral of removal under Article 3 of the UN Convention Against Torture. The respondent is not eligible for voluntary departure because he is an arriving alien.

In his request for political asylum, the respondent did not provide a narrative statement attached to his I-589. The respondent did, however, indicate the basis for his request for asylum as one based on political opinion. *See* Exhibit 2, I-589, page 5, part B, question 1. The respondent further wrote in his I-589 that the police had gone to his home to arrest and beat him on April 9th of 2000. According to the respondent's I-589, he simply indicated that the police were trying to find his pregnant girlfriend and to attempt to force him to pay a fine. Consequently the respondent indicates that he was forced to flee the People's Republic of China for the United States.

The respondent's I-589 does reference the fact that the respondent's whole family believes in Christianity. Exhibit 2, I-589, page 6, part B, question 3. As will be discussed below, the respondent has not asserted that he has been persecuted because of his religion, however, the respondent does reference the fact that his family was Christian.

Appendix B

Contention of the Department of Homeland Security

The Department argues that the respondent has failed to meet the burden of proof in establishing that he merits any refuge in the United States. The Department further argues that as a matter of law, the respondent has failed to submit a claim upon which asylum or any relief can be granted. Consequently, it should be denied.

Determination

The preponderance of the evidence shows that the respondent has failed to meet his burden of establishing past persecution or a well-founded fear of present or future persecution if returned to the People's Republic of China.

Findings of Fact

All proposed findings and conclusions of the parties have been considered to the extent that the findings and conclusions herein are inconsistent with those set forth by the parties they have been rejected. The following findings of fact are based upon a preponderance of the credible evidence presented at the removal hearing:

The respondent is Hao Zhu. He was born on August 16, 1983 in Fuzhou, China.

The respondent is an ethnic Han, who is also Christian. The respondent's parents are Yumei Weng and Ben Zhang Zhu, both of whom are still living in Fuzhou, China.

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The respondent also has a sibling named Han Zhu who is older than the respondent. Han Zhu was born in 1981. The respondent's family has not been victimized by coercive family practices in the People's Republic of China, despite having two sons.

The respondent was attending junior high school in Lan Qi, Fuzhou, Fujian, China between September of 1998 and April of 2000. This as a junior high school where the respondent met Yun Dong, his girlfriend.

The respondent met Yun Dong on October 9, 1999 at a birthday party. The respondent attended the same middle school with Yun Dong, however they were not in the same class. He was in class 4, she was in class 6.

The respondent eventually fell in love with Yun Dong.

At a party held on February 7, 2000, the respondent met up with Yun Dong, along with other students, at the home of Feng Lin. At that party, all of the attendees were eating, talking, and playing various games. At this party, the respondent had occasion to have sexual intercourse with Yun Dong. As a result of that act of intimacy, Yun Dong became pregnant.

On April 6, 2000, Yun Dong's pregnancy became known to school officials. As a student, she was required to undergo various testing, including testing for pregnancy, along with all other students.

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The respondent was suspected of being the individual responsible for impregnating Yun Dong.

On about April 7, 2000, the school officials spoke with the respondent about his part in getting Yun Dong pregnant. According to the respondent at this time, he admitted having had intercourse with Yun Dong and ultimately his responsibility for the pregnancy.

The respondent's parents and Yun Dong's parents discussed the pregnancy. The parents decided amongst themselves that they would attempt to keep the child.

Yun Dong was sent to Shan Ming City in order to hide her pregnancy. She was given an appointment to appear on April 8, 2000 at the hospital for examination by physicians under order of the family planning commission.

Yun Dong did not appear on April 8, 2000 as ordered.

The respondent was visited by five family planning committee people who went to his home. The family planning committee sought out the respondent in order to have him appear in order to attempt to coerce his girlfriend to appear that the hospital.

The respondent fought with the family planning officials; he admittedly did not obey their order and tried to run away. In the ensuing malay, the respondent was hit on the head by a brick. The respondent was injured and required approximately seven stitches to close the wound.

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The respondent's neighbors came to assist the respondent escape the family planning committee. The respondent received the medical attention he needed in order to clean his wound and left his province also for Shan Ming City.

On about June 10, 2000, Yun Dong learned of the respondent's injury. She attempted to meet up with the respondent, however she did not know that he had left his home. Consequently, she was taken away and forced to undergo an abortion.

The respondent never went back to his hometown, however he did meet Yun Dong in September of 2000 prior to leaving the People's Republic of China. They discussed their future together and the respondent decided to leave the People's Republic of China for the United. States. Yun Dong was not pleased with the respondent at this point.

The respondent arranged with smugglers to leave the People's Republic of China for the United States.

The respondent's parents were responsible for paying the smugglers $30,000 to pay his way to the United States.

The respondent arrived at O'Hare International Airport on September 16, 2000. At that time he was questioned by the Immigration Service at the airport. Under oath he provided information to the Immigration Service stating that he left China because of the birth control policy. *See* Exhibit 3, page 5. The respondent answered that he was sought after for arrest in response to a Government question as to whether the government of China had ever done anything that made him unwilling to return there.

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The respondent was asked if he would be harmed if he returned to China, the respondent answered that he would, that he would possibly sit in jail.

Conclusions of Law

An applicant for asylum, withholding, and deferral of removal bears the evidentiary burdens of proof and persuasion. *See Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985), modified; *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987).

An applicant for asylum must demonstrate that he is a "refugee" within the meaning of Section 101(a)(42) of the Act. This requires him to show that he's unable or unwilling to return to his country because of past persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion. 8 U.S.C. Section 1101(a)(42)(A) (2003).

Persecution has repeatedly been described as "punishment or other infliction of harm for political, religious, or other reasons that this country does not recognize as legitimate." *Peg Zatowski v. INS*, 278 F.3d 665, 669 (7th Cir. 2002)

Persecution means more than harassment and may include such actions as detention, arrest, interrogation, prosecution, imprisonment, illegal searches, confiscation of property, surveillance, beatings, or torture. *See Peg Zatowski v. INS*, (quoting *Mitev v. INS*, 67 F.3d 1325, 1330 (7th Cir.)).

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In order to have a "well-founded fear" the petitioners fear of persecution must not only be subjectively genuine, but objectively reasonable. *Mitev*, 67 F.3d at 1331. Satisfactory proof of past persecution will give rise to the presumption that the petitioner's also established a well-founded fear of future persecution. 8 C.F.R. 1208.13(b)(1) (2003).

Any applicant for asylum is considered to have applied for withholding of removal pursuant to Section 241(b) of the Act. In order to establish eligibility, an applicant must establish that it is more likely than not that he would be subjected to persecution upon deportation. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430 (1987).

An applicant for asylum is also considered to have applied for relief pursuant to the Convention Against Torture. In order to have his removal deferred, the respondent must establish that he would be treated in an inhumane or degrading manner if returned to the People's Republic of China. 8 C.F.R. Section 1208.16(a)(1) (2003). The respondent must establish that it is more likely than not that he would be tortured or treated inhumanely by the government or by agents acting at direction of or with the acquiescence of the government. If he meets this burden, he may not be removed to his country.

Discussion of the Evidence

The respondent has filed his I-589, as previously indicated. The record reflects that the respondent filed his I-589 on January 14, 2003. The respondent entered the United

States on September 16 of 2000. An issue was raised about whether the as required respondent had filed within the one year time frame, as required by the regulations at 8 C.F.R. Section 1208.4 (2003). This Judge has given the respondent the benefit of the doubt and has allowed him to file for asylum based on the Board's decision in *Matter of Y-C-*, 23 I&N. Dec 286 (BIA 2002). The Board in *Y-C-* recognized that extraordinary circumstances existed in the case of an unaccompanied minor who was in the custody of the Service pending removal proceedings during the one year period following his arrival in the United States. *Id.* The facts in this case are similar to the facts in *Y-C-*. The respondent had been in custody from his attempted arrival in the United States on September 16, 2000 until he turned 18 on August 16 of 2001. The respondent id return with counsel on September 12, 2002 (over one year later) and filed his application for asylum on January 14, 2003. Despite the respondent having turned 18 in August of 2001 and having filed his application for asylum almost one and one half years later, this Judge has given the respondent the benefit of the doubt as referenced by the Board in *Y-C-*. Consequently the respondent is deemed eligible for political asylum.

Despite having reached the conclusion that the respondent is eligible for political asylum, it is the assessment of this Judge that the respondent has not experienced "past persecution" on account of coercive family practices in the People's Republic of China.

The respondent, as previously indicated, he's filed his I-589 as well as having provided his own testimony in order to support his stated claim to persecution. As previously

indicated in the preceding determination section, the respondent has failed to meet his burden of establishing that he has experienced past persecution. In support of this conclusion, this Judge has found that the testimony of the respondent on aspects related to his relationship with his girlfriend, Yun Dong, should be full credited. There are certain aspects of the respondent's testimony that will not be credited, specifically the respondent's testimony wherein he has testified that his family home was destroyed in June of 2000. This Judge will not accept the respondent's testimony as truthful in this regard because it is seen as an attempt to embellish his claim of stated persecution.

In support of this conclusion, this Judge would point the parties to the fact that the respondent has not mentioned the fact that the home of his parents was destroyed in June of 2000. This comes despite the respondent's assertions that he did not previously mention this incident when he arrived in the United States because he was nervous and afraid.

This Judge is mindful as well as sensitive to a juvenile's arrival in the United States. The respondent testified that he did not tell the Immigration officers all of the facts in this case because he was afraid. He did mention that he was fearful of returning to China because of it's coercive family practices. However, the respondent's own testimony and reason provided for not being forthright with the Government is undercut by the very fact that the respondent retained counsel who filed an application for political asylum over two years later, which omits any reference whatsoever about his family's home being destroyed. *See* Exhibit 2. Consequently, this aspect of the respondent's testimony is not credited.

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Turning back to the facts in the respondent's case, it is the assessment of this Judge that the respondent did have a relationship with his girlfriend, Yun Dong. The respondent has testified in a consistent and credible manner about the manner in which they met, the school which they both attended, and the circumstances under which she became pregnant. However, assuming the truthfulness of the respondent's testimony, it is the assessment of this Judge that the visit to the respondent by the family planning commission and the subsequent violence which ensued does not constitute "past persecution" within the meaning of the Immigration Act. The 7th Circuit in numerous Cases have discussed the distasteful assignment to have to quantify suffering for purposes of determining eligibility. The 7th Circuit in *Dan-Dan v. Ashcroft*, 339 F.3d 567 (2003), discussed the case of an individual who had been arrested and detained one time. According to the facts in *Dan-Dan*, he was arrested one time for a three day detention. During the course of his detention the respondent, Dan-Dan, was physically abused. While recognizing that Dan-Dan's single detention is distinguishable from precedents for finding past persecution, the 7th Circuit concluded that Dan-Dan's detention as he related it did not rise to a level of persecution.

Specifically, the 7th Circuit discussed the fact that Dan-Dan was detained for three days without food. The 7th accepted the fact that the respondent, Dan-Dan, had been beaten to the extent that his face had become "swollen." However the 7th Circuit concluded that he had failed to establish that he had experienced past persecution. Consequently, the 7th Circuit affirmed the decision of the Board of Immigration Appeals.

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As previously indicated in turning to the facts of this case, the respondent was sought by members of the family planning committee. The interesting angle in this case as distinguishable from other family practice cases is the very fact that the respondent's situation is distinguishable from other family planning cases to the extent that he had no marital relationship with his girlfriend. This Judge is mindful of this conclusion because the respondent himself had one male sibling and testified that he and his brother, as well as mother and father, were never targeted by he family planning committee in their province in the People's Republic of China.

Given the factual scenario as it has unfolded in this particular case, the respondent's girlfriend was eventually arrested an taken to a hospital where the respondent testified that she had the fetus aborted. It is the assessment of this Judge that, despite the respondent having received seven stitches in a malay, that he, himself has not experienced past persecution based on coercive family practices.

Having reached this conclusion, this Judge assess the evidence for a determination as to whether there is a well-founded fear of present or future persecution if the respondent returns to the People's Republic of China. It is the assessment of this Judge that unfortunately having had the child aborted, the respondent himself has no fear of present or future persecution upon his arrival in the People's Republic of China. This conclusion is based on the fact that the government, assuming the respondent's testimony's entirely true, has apparently carried out it's coercive family practices or it's committee's belief that a single mother should not

have a child. The respondent fortunately was spared. Given the fact that there is no longer a child, it is the assessment of this Judge that the respondent himself does not have a well-founded fear of present or future persecution.

This Judge is mindful that the respondent's girlfriend, Yun Dong, has a viable claim for relief under the asylum laws under the United States. She did have a child aborted in order to satisfy her government's coercive family practices, however, she is in the People's Republic of China; the respondent is present.

For the foregoing reasons, the respondent's request for asylum is denied. He's failed to state a claim upon which asylum may be granted.

Given the fact that the respondent has failed to meet the standard necessary to be granted political asylum, it necessarily follows that he has failed to meet the heavier standard of showing that it is more likely than not that he would upon return to the People's Republic of China for any reason. As previously indicated in the preceding sections, the respondent did claim to be of a Christian religion. The respondent's request for asylum is in no way dependent upon his being a Christian. The respondent did testify that as a Christian he and his wife wanted to keep the child, however this Judge believes that this is not a claim upon which asylum or withholding of removal could be granted. Consequently, withholding pursuant to Section 241(b) of the Act will be denied.

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The respondent has not established that it is more likely than not that the government of the People's Republic of China will treat him in an inhumane manner if he is returned. This Judge is mindful of the fact that had there been role reversal and Yun Dong been in the United States she might be eligible for Convention Against Torture relief, however that is not the case The respondent's request will be denied and the following order will be issued.

Order

IT IS ORDERED that the respondent's request for asylum, withholding, and deferral of removal be denied;

IT IS FURTHER ORDERED that the respondent be removed and deported from the United States to the People's Republic of China on the charges contained in the Notice to Appear.

Date: April 20, 2004

CARLOS CUEVAS
U.S. Immigration Judge

APPENDIX C — DECISION OF THE UNITED STATES DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW DATED JUNE 29, 2005

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A78-289-252 - Chicago

In re: ZHU, HAO(J)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Ma, Pengtian, Esquire

ON BEHALF OF DHS: Joseph M. Yeung

ORDER:

PER CURIAM. We adopt and affirm the decision of the Immigration Judge. See Matter of Burbano, 20 I&N Dec. 872, 874 (BIA 1994) (noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those the Immigration Judge articulated in his or her decision"). The Immigration Judge appropriately denied the respondent's request for a further continuance. He correctly concluded that the respondent failed to meet his burden of proving that he is eligible for asylum, withholding of

removal, or protection under the Convention Against Torture. Accordingly, the appeal is dismissed.

s/ Frederick D. Hess
FOR THE BOARD

FILED
APR 04 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-893

In the Supreme Court of the United States

HAO ZHU, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
DONALD E. KEENER
ALISON R. DRUCKER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the court of appeals erred in upholding the Board of Immigration Appeals' decision that an unmarried, 16-year-old boy did not suffer "persecution" when his girlfriend was forced to undergo an abortion.

2. Whether the court of appeals erred in holding that the administrative record did not compel the conclusion that a single incident of assault constituted persecution.

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In the Supreme Court of the United States

No. 06-893

HAO ZHU, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 465 F.3d 316. The order of the Board of Immigration Appeals (Pet. App. 41a-42a) and the decision of the immigration judge (Pet. App. 24a-40a) are unreported.

JURISDICTION

The court of appeals entered its judgment on September 29, 2006. The petition for a writ of certiorari was filed on December 28, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, an alien may be granted asylum, in the Attorney General's discretion, if "the At-

torney General determines that such alien is a refugee." REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 101(a)(1) and (2), 119 Stat. 302-303 (to be codified at 8 U.S.C. 1158(b)(1)(A) (Supp. V 2005)). As relevant here, the INA defines "refugee" to include

> a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program.

8 U.S.C. 1101(a)(42)(B). Such persons "shall be deemed to have been persecuted on account of political opinion." *Ibid.*

In addition to the discretionary relief of asylum, mandatory withholding of removal from a particular country is available if "the Attorney General decides" than an alien's "life or freedom would be threatened in [the country of removal] because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A).

For purposes of those forms of protection from removal, "persecution" refers to significant mistreatment, and it must be inflicted either by the government of the applicant's country of origin, or by groups or individuals the government is "unable or unwilling to control." *In re Acosta*, 19 I. & N. Dec. 211, 222 (B.I.A. 1985), overruled in part on other grounds by *In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987); see *In re Villalta*, 20 I. & N. Dec. 142, 147 (B.I.A. 1990). Persecution is an "extreme concept." *Fatin* v. *INS*, 12 F.3d 1233, 1243 (3d Cir. 1993) (Alito, J.).

2. Petitioner is a native and citizen of China who, as a 17-year-old, attempted to enter the United States. He

was immediately placed in removal proceedings and charged with attempting to enter without valid documents. When petitioner turned 18, he was permitted to file an (otherwise untimely) application for asylum, in which he alleged persecution based on his opposition to China's population-control policy. Pet. App. 2a, 24a-26a, 29a, 34a-35a.

In his hearing before an immigration judge, petitioner testified that, at the age of 16, he impregnated his girlfriend, a fellow middle school student. When the pregnancy was discovered in April 2000, the girlfriend refused to appear at a hospital as directed by the family planning commission and, instead, hid in another city. When family planning officials visited petitioner's home, they ordered him to go with them in an effort to coerce his girlfriend to appear at the hospital. When petitioner resisted, a melee ensued, in which petitioner was struck by the officials and was hit on the head by a brick. The wound required seven stitches. The officials did not detain petitioner, but asked him to turn himself in after he received medical attention. Rather than report to the officials, petitioner went to find his girlfriend, who, unbeknownst to him, had already returned home, been discovered, and been forced to abort the pregnancy. Pet. App. 2a, 29a-31a.

In September 2000, petitioner met with his girlfriend and informed her that he was leaving for the United States. Pet. App. 2a, 31a-32a. She "was not pleased with the respondent at this point." *Id.* at 32a. Petitioner then paid smugglers $30,000 to bring him to the United States. *Ibid.* When detained at the border, petitioner was asked if he feared harm if returned to China, to which he responded that "he would possibly sit in jail." *Id.* at 33a.

The immigration judge denied petitioner's applications for asylum and withholding of removal under both the INA and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. 19, 1465 U.N.T.S. 85. See Pet. App. 24a-40a. The immigration judge concluded that petitioner "has failed to meet his burden of establishing that he has experienced past persecution." *Id.* at 36a. The immigration judge generally credited petitioner's testimony about his relationship with his girlfriend, but specifically found that his claim that family planning officials destroyed his family home as punishment (see Pet. 2) was not truthful and, in fact, was nothing more than "an attempt to embellish his claim of stated persecution." Pet. App. 36a.

The immigration judge then held that the single melee between petitioner and family planning officials, in which he was hit and his head was cut, did not amount to "persecution" within the meaning of the INA. Pet. App. 38a. The immigration judge further concluded that, because petitioner "had no marital relationship with his girlfriend," the abortion forced upon her did not amount to persecution of him, and thus that petitioner had not "experienced past persecution based on coercive family practices." *Ibid.* In addition, the immigration judge found no well-founded fear of future persecution because the abortion was a completed event and petitioner had provided no evidence of a risk of future persecution arising out of that event. *Id.* at 38a-39a.

The Board of Immigration Appeals (BIA) affirmed in a brief per curiam order. Pet. App. 41a-42a.

3. a. The court of appeals denied the petition for review. Pet. App. 1a-23a. Stressing the "fact-specific"

nature of the persecution determination, *id.* at 6a, the court concluded that, "consider[ing] all of the circumstances of the incident in specific detail," *id.* at 4a, the "isolated beating" suffered by petitioner, while "deplorable," "does not compel a finding of past persecution," *id.* at 8a. The court noted that, in most cases, a finding of persecution rests on "one or more additional factors" beyond a single physical injury, *id.* at 4a, such as repeated assaults, prolonged detention, or another form of inhumane treatment, so that the "overall experiences endured" are "both more prolonged and more severe than that which [petitioner] encountered," *id.* at 5a. Finally, the court explained that, "[e]ssential to [its] ruling" was "the deferential nature of substantial evidence review," which precludes overturning the BIA's decision unless the record "compels" the contrary result. *Id.* at 8a.

The court also held that the abortion forced upon petitioner's girlfriend did not amount to persecution of him. The court noted that, under BIA and Seventh Circuit precedent, the definition of "refugee" that encompasses forced abortions and other coercive population control measures, 8 U.S.C. 1101(a)(42)(B), includes the husband of a woman who has a forced abortion, even if the government refuses to recognize the marriage as an aspect of its population control program. Pet. App. 9a. In this case, however, "[t]here was not even a suggestion that [petitioner and his girlfriend] had planned to wed." *Ibid.* Accordingly, the court held that "[w]e, like other circuits, have declined to expand the definition of 'refugee' to include the boyfriends of women who are forced to abort a pregnancy." *Ibid.*

Finally, the court affirmed the immigration judge's determination that petitioner had no well-founded fear

of future persecution. Pet. App. 9a-10a. The court, in fact, found petitioner's alleged fear of arrest to be "strange given the officials' decision not to detain him on April 8, [2000]," and the further fact that petitioner "remained in China until September and was never detained." *Id.* at 10a.

b. Judge Rovner dissented. Pet. App. 12a-23a. She agreed that the BIA "need not extend asylum to every man who has impregnated a woman who was later forced to terminate a pregnancy," but would have focused the persecution inquiry on "the nature of the relationship between the asylum applicant and the woman," rather than on their marital status. *Id.* at 19a. She suggested that the record in this case was "probably sufficient to establish the type of commitment" her suggested approach would require, but concluded that, "in any event it is a factual inquiry that ought to be made on a case-by-case basis." *Id.* at 20a.

ARGUMENT

1. Petitioner contends (Pet. 6-10) that this Court should decide whether the boyfriend of a woman forced to undergo an abortion falls within the INA's definition of refugee, which includes

> a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program.

8 U.S.C. 1101(a)(42)(B).

This Court's review of that question is not warranted for two reasons. First, there is no conflict in the circuits. As the Seventh Circuit noted (Pet. App. 9a), its decision in this case is consistent with those of "other

circuits, [which] have declined to expand the definition of 'refugee' to include the boyfriends of women who [were] forced to abort a pregnancy." No court has extended the definition to include mere boyfriends. See *Chen* v. *Ashcroft*, 381 F.3d 221, 226-227, 229 (3d Cir. 2004) (deferring to the BIA's decision not to extend the refugee definition to "unmarried partners").

Petitioner is correct that the courts of appeals have included within the definition of "refugee" spouses in both officially recognized marriages and in traditional marriages that have not been sanctioned by the government because of its coercive family control policy. See Pet. 6 n.1; Pet. App. 9a.[1] But that context-sensitive definition of the marital relationship is of no help to petitioner here because (i) the involved individuals were middle-school-aged teenagers, *id.* at App. 29a-30a, and "[t]here was not even a suggestion that they had planned to wed," *id.* at 9a; and (ii) petitioner, in fact, abandoned his girlfriend, over her objection, to come to the United States, *id.* at 32a. Indeed, even the dissenting judge expressed some hesitation as to whether the record in this case would justify the conclusion that petitioner was sufficiently committed to his girlfriend as to merit protection. *Id.* at 20a.

Second, the BIA recently addressed the application of the refugee definition to the male partners of women forced to undergo abortions. See *In re S-L-L-*, 24 I. & N. Dec. 1 (B.I.A. 2006). In that case, the BIA lim-

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[1] See *Zhang* v. *Gonzales*, 434 F.3d 993, 995 (7th Cir. 2006) (extending protection to spouse who was married in a traditional ceremony, even though the marriage was not officially registered); *Ma* v. *Ashcroft*, 361 F.3d 553, 561 (9th Cir. 2004) (including within the definition of "refugee" men whose marriages would be legally recognized but for China's restrictions on age of marriage).

ited the category of spouses who will qualify for relief, see *In re C-Y-Z-*, 21 I. & N. Dec. 915 (B.I.A. 1997), to those spouses who both were opposed to the abortion and were legally married at the time of the abortion. *S-L-L-*, 24 I. & N. Dec. at 4. The BIA also suggested that "there may be cases in which an unmarried partner in an extremely close and committed relationship may demonstrate persecution based on the clause referring to 'other resistance to a coercive population control program.'" *Id.* at 10.[2]

The BIA's decision thus leaves no room for arguing that mere boyfriends—especially underage ones who have since abandoned their girlfriends—qualify as refugees. The Board's interpretation of the INA's definition of "refugee," moreover, is entitled to substantial deference. See *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999). Finally, given the recency of that decision and the lack of circuit precedent addressing it, review of the BIA's interpretation and application of the statutory definition at this time would be premature.

2. Petitioner also seeks review (Pet. 10-12) of the question whether the incident in which he was hit and sustained a head injury, either separately or combined with his relationship to his girlfriend's pregnancy, constitutes persecution. However, that record-bound and "fact-specific" (Pet. App. 6a) application of settled law to the "specific detail[s]" of this case (*id.* at 4a) does not merit this Court's review.

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[2] The Second Circuit granted initial hearing en banc of the petition for review filed in *S-L-L-*. See *Shi Liang Lin* v. *Department of Justice*, No. 02-4811 (hearing en banc granted Nov. 14, 2006) (argued Mar. 7, 2006).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

PETER D. KEISLER
Assistant Attorney General

DONALD E. KEENER
ALISON R. DRUCKER
Attorneys

APRIL 2007